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13 **UNITED STATES DISTRICT COURT**
14 **FOR THE DISTRICT OF ARIZONA**
15 **PHOENIX DIVISION**

16 William Price Tedards, Jr.; Monica Wnuk;
Barry Hess; Lawrence Lilien, and Ross
17 Trumble;

18 Plaintiffs,

19 v.

20 Doug Ducey, Governor of Arizona, in his
official capacity, and Jon Kyl, Senator of
21 Arizona, in his official capacity,

22 Defendants.

No.

**PLAINTIFF'S MEMORANDUM
OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

INTRODUCTION

Under the Seventeenth Amendment the people of Arizona have an express right to an election to fill the U.S. Senate vacancy left by the death of Senator McCain—and to do so at the earliest practicable date on which an orderly election can be held. Plaintiff voters seek an order for the defendant Governor to issue a writ of election, as expressly required by the Seventeenth Amendment. The second paragraph of the Seventeenth Amendment states:

"When vacancies happen in the representation of any State in the Senate, the executive authority of such State *shall* issues *writs of election* to fill such vacancies, Provided, That the Legislature of any State may empower the executive to make *temporary* appointments until the people fill the vacancies by election as the legislature may direct."

(Emphasis supplied.)

The defendant Governor has an express constitutional duty to issue a writ of election to fill the McCain vacancy. *Judge et al. v. Quinn*, 612 F.3d 537, 555-556 (7th Cir. 2010) (under Seventeenth Amendment, "the executive officer of the state must issue a write of election"), *cert. denied* 131 S. Ct. 2958 (2011). The defendant Governor has failed to perform that duty, and Ariz. Rev. Stat. (A.R.S.) § 16-222 purports to deny his authority to do so. Indeed, by law, A.R.S. § 16-222 unlawfully postpones the date to fill the vacancy until the next general election in November 2020. In the case of the McCain vacancy, it unlawfully mandates that a temporary appointee shall represent the people of the State, long after an election could have been held. Under both the proviso to the Seventeenth Amendment and Article I, section 4 (Elections Clause), a state legislature has no authority to *require* an appointee to serve in the Senate beyond the date that the people

1 could have filled the vacancy by an orderly election. Under the Elections Clause, a state
2 legislature may only issue neutral procedural regulations with respect to such an election
3 and may not dictate that a temporary appointee serve for over two years and preclude the
4 people from making their own decision. By the acts set forth here and in violation of 42
5 U.S.C. §1983, the defendant Governor is depriving plaintiffs of their fundamental right to
6 vote under the Seventeenth Amendment. In further violation of 42 U.S.C. § 1983, the
7 defendant Governor is also depriving plaintiffs of their rights under the First Amendment
8 and under the Privileges and Immunities Clause and Equal Protection Clause of the
9 Fourteenth Amendment.

10
11 This year in *Hamamoto v. Ige*, 881 F.3d 719, 723 (9th Cir. 2018), in a case similar
12 if not identical to the present case, the Court of Appeals for the Ninth Circuit declared
13 that parties bringing such a case are entitled to an expedited ruling: "[A] suit challenging
14 the appointment of a United States Senator raises questions of national importance, and
15 the judicial system has evolved procedures for expediting review of time-sensitive
16 controversies." While filing this motion under Fed. R. Civ. P. (Rule) 65, plaintiffs seek
17 such an expedited ruling on the merits, as this Court may do under Rule 65(a)(2). The
18 irreparable injury to the right to vote is self-evident, and the case presents almost entirely
19 a question of law.

20 **FACTUAL BACKGROUND**

21
22 The facts in this case are matters of public record. On August 25, 2018 Senator
23 John McCain died, and a vacancy in the State's representation in the Senate arose. The six
year term to which Senator McCain was elected in 2016 is to expire in January 2023.

1 Under Arizona law the election to fill the remainder of the term created by the death of
2 John McCain will take place in November 2020. Under the terms of A.R.S. § 16-222, had
3 McCain died or resigned before April 30, 2018, the special election would have occurred
4 in November 2018. Because he died less than six months before the general election this
5 November, Arizona law prohibits the people from the filling the vacancy by election until
6 November 2020, more than two years away.

7 On September 4, 2018 defendant Governor Ducey appointed defendant Jon Kyl to
8 serve until the next general election in November 2020. Defendant Kyl has stated that he
9 will serve only until the end of this year. The defendant Governor is then mandated by
10 state law to appoint a successor. This appointee, including the current appointee Kyle,
11 serves at the pleasure of the Governor.

12 Though the Seventeenth Amendment requires the Governor to issue a writ of
13 election, the Governor has issued no such writ, has not called for an election, and has no
14 role under the controlling state statute in calling for the election held in November 2020.
15

16 17 **ARGUMENT**

18 **I. The defendant Governor has a duty to issue a writ of election to fill the McCain** 19 **vacancy.**

20 The defendant Governor has a mandatory duty under the Seventeenth Amendment
21 to issue a writ of election. *Judge*, 612 F.3d at 555-556 (7th Cir. 2010). For the
22 convenience of the Court plaintiffs set out again the Constitution's procedure for filling
23 vacancies in the Senate:

1 "When vacancies happen in the representation of any State in the
 2 Senate, the executive authority of such State *shall* issues *writs of*
 3 *election* to fill such vacancies, Provided, That the Legislature of any
 4 State may empower the executive to make *temporary* appointments
 until the people fill the vacancies by election as the legislature may
 direct."
 (Emphasis supplied.)

5 In the leading case of *Judge v. Quinn*, the Seventh Circuit explained the historic function
 6 of such a writ of election. 612 F.3d at 552. At the time the Constitution was adopted, such
 7 writs were the exclusive method of filling vacancies. As stated by the court in *Judge*, the
 8 requirement for a writ to fill a Senate vacancy is modeled on the provision in Article I,
 9 section 2, which requires the use of an executive writ to fill a vacancy arising in the U.S.
 10 House. *Judge*, 612 F.3d at 547, 552. After reviewing the writ's history, the Court stated:

12 "[The governor has a duty to issue a writ of election to fill [a]
 13 vacancy. . . The language of the Seventeenth Amendment is enough
 on its own to authorize the executive's action, no matter what the
 state law says or does not say."

14 *Id.* at 555-56. The court made clear this duty is "mandatory" and "indispensable." *Id.* The
 15 court also concluded that the proviso to the Seventeenth Amendment does not supersede
 16 the duty to issue a writ of election—or provide an alternative to it. As used in the proviso
 17 to the Seventeenth Amendment, the words "as the legislature may direct" are not an
 18 exception to the Governor's duty to issue the writ. As the court in *Judge* states: "Nothing
 19 about the state legislature's power to direct the election to fill a vacancy qualifies or
 20 nullifies the executive's duty to issue writs of election." *Id.* at 554.

22 The Governor has so far failed to issue a writ of election; and under A.R.S. § 16-
 23 222 the Governor has no authority to do so. Plaintiffs are entitled to an order requiring

1 the Governor to perform his constitutional duty and issue a writ calling for election at the
 2 earliest practicable date. Plaintiffs now turn to why they are entitled to such an election.

3 **II. Under the Seventeenth Amendment and the Elections Clause, the state**
 4 **legislature has no authority to prevent the people from filling the McCain vacancy**
 5 **by election at the earliest practicable date.**

6 In *Judge*, the court made clear that the phrase "as the legislature may direct"
 7 confers on a state legislature the same authority that is conferred by the Elections
 8 Clause—that is, the authority to issue procedural regulations as to time, place and
 9 manner. *Id* at 552. The court states:

10 "The phrase 'as the legislature may direct' affirms that the
 11 Amendment was not intended to change the *Elections Clause of the*
 12 *original Constitution, U.S. Const. art. I 4, cl.1*; after all, the
 13 Seventeenth Amendment, as a later enactment, might have modified
 it. . . . State law controls the timing and other procedural aspects of
 vacancy elections."
 (Emphasis supplied.)

14 The Elections Clause confers no authority for a law like A.R.S. § 16-222 which mandates
 15 that an appointee of the Governor serve for a two-year period, long after the people could
 16 have filled the vacancy in an orderly election. In *U.S Term Limits v. Thornton*, 514 U.S.
 17 779, 833-34 (1995) the Supreme Court placed emphatic limits on the authority of a state
 18 legislature under the Elections Clause:

19 "[T]he Framers understood the Elections Clause as a grant of
 20 authority to issue procedural regulations, and not as a source of
 21 power to dictate electoral outcomes, or to favor or disfavor a class of
 candidates or to evade other important constitutional restraints."

22 The Court has since reaffirmed this limited reading of the Elections Clause. *Cook v.*
 23 *Gralike*, 531 U.S. 510, 523 (2010). Likewise, as just noted *Judge* makes clear that the

1 legislature has no greater authority under the Seventeenth Amendment's proviso than it
2 does under the Elections Clause. Yet in A.R.S. § 16-222, the state legislature has gone
3 well beyond that authority by mandating in this case that an appointee shall serve in
4 preference to a Senator elected by the people. To paraphrase the Court in *U.S. Term*
5 *Limits*, A.R.S. § 16-222 "dictates" an election outcome because the Governor's appointee
6 shall serve a two-year period, an effective term of Congress, well beyond the period an
7 election could be held. It also "favors" a class of candidates, namely, those favored by the
8 Governor, and "disfavors" another class of persons, namely, those whom the people
9 might otherwise prefer. Indeed, the longer the Governor's appointee can serve in the
10 Senate, the greater the incumbency advantage for the appointee should he or she run in
11 the next general election. A.R.S. § 16-222 also "evades" other important constitutional
12 restraints, namely, the restraint of the Qualifications Clause, since it is the Governor who
13 determines the "qualifications" of the person representing the people of this state. In *Cook*
14 *v. Gralike*, which also set limits on state authority under the Elections Clause, Justice
15 Kennedy wrote in concurrence:

17 "A State is not permitted to interpose itself between the people and
18 their National Government. . . [This] dispositive principle. . . is
19 fundamental to the Constitution."
531 U.S. at 527.

20 In this case, A.R.S. § 16-222 is a profound "interposition" between the people of
21 Arizona and the National Government by keeping a temporary appointee in the
22 Senate long after the people of Arizona could have made their own choice.
23

1 Indeed, even in cases not involving the Elections Clause, the Court has repeatedly
2 stated that a state legislature may issue only "procedural" or "politically neutral"
3 regulations. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (upholding neutral regulations
4 regarding write-in ballots); *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (striking down
5 restrictions that were placed on independent candidates only). By no means is A.R.S. §
6 16-222 a "procedural" regulation: rather it is a value judgment as to who may best
7 represent the people of Arizona. The Elections Clause does not permit the state
8 legislature to make such a judgment—only to issue procedural regulations necessary to
9 prevent "chaos" in the election process. *Storer v. Brown*, 415 U.S. 724, 730 (1974); *see*
10 *also U.S. Term Limits*, 514 U.S. at 834-35 (collecting cases). It is acknowledged in
11 A.R.S. § 16-222 itself (at paragraph (b)) that an orderly election could be held in six
12 months.

14 Furthermore, use of a temporary appointee to fill a Senate vacancy was taken from
15 the original Article I, section 3, which provided for such an appointee *only* until the state
16 legislature could agree on whom to fill a vacancy. Indeed, prior to the Seventeenth
17 Amendment, the state legislatures would often deadlock over whom to elect. See Amar,
18 *Are Statutes Constraining Gubernatorial Power. . . Constitutional Under the Seventeenth*
19 *Amendment?* 35 Hastings Const. L.Q. 727, 741-42 (2008). The use of a temporary
20 appointee was to fill a gap while the stalemate occurred. *Id.* But this power of the
21 Governor to make a temporary appointment under the original Article I, section 3 never
22 restricted or barred the legislature from filling the vacancy whenever it liked. Similarly,
23 there is no basis to interpret the same use of a temporary appointee, carried over from

Article I, section 3, to restrict the right of the people to have an election as soon as practicable. That is especially true when the right of the people to direct elected representation is a fundamental constitutional right.

III. Plaintiffs have a fundamental right to elected representation in the Congress.

Nothing in the second paragraph of Seventeenth Amendment authorizes the state legislature to delay an election or restrict or nullify the fundamental constitutional right of the people to elected representation. Recently, in *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2675 (2015), a case arising under the Elections Clause, the Court stated:

"... our fundamental instrument of government derives its authority from 'We the People.' U.S. Const., Preamble. As this Court stated, quoting Hamilton: "[T]he true principle of a republic is, that the people should choose whom they please to govern them.' *Powell v. McCormack*, 395 U.S. 486, 540-41 (1969).

The Court in that case described the Elections Clause as being a "safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate." *Id.* at 2672.

In *U.S. Term Limits*, the Court also pointed out that the right of the people to elect "whom they wish" should not vary from state to state, at the whim of their state legislatures. 514 U.S. at 837. Rather, the right of the people to have representatives of their own choosing is crucial to the "structure" of the Union. *Id.* at 838. If Americans did not have a uniform right to elected representation as soon as practicable, then their rights as federal citizen would vary from state to state. As Justice Kennedy said in his concurring opinion in *U.S. Term Limits*: "Nothing in the Constitution . . . supports the

1 idea of state interference with the most basic relation between the National Government
 2 and its citizens, the selection of legislative representatives." *Id.* at 842. Because the right
 3 to fill a vacancy in the Senate by election held in an orderly manner at the earliest
 4 practicable date is inherent in the very structure of the Constitution, it is accordingly a
 5 privilege and immunity of federal citizenship. It is a privilege and immunity of national
 6 citizenship, of the kind recognized long ago in *The Slaughter House Cases*, 83 U.S. 36
 7 (1873), and is the basis for an order setting a date of election as soon as practicable.

8 **IV. The decision in *Valenti v. Rockefeller* is no bar to relief.**

9
 10 In *Valenti v. Rockefeller*, 292 F. Supp. 851 (S.D.N.Y. 1968), *summarily aff'd* 393
 11 U.S. 405 (1969) a three-judge district court left intact a New York law that delayed an
 12 election to fill a Senate vacancy for 29 months. However, the order summarily affirming
 13 it has been called into question by subsequent decisions of the Supreme Court. In such
 14 cases, a summary order is not binding on this Court. *See Latta v. Otter*, 771 F.3d 456,
 15 466-67 (9th Cir. 2014) (summary orders are only binding precedent as to the "precise
 16 issues presented" in those cases, and only "until doctrinal developments indicate
 17 otherwise"); *Wright v. Lane Cnty. Dist. Ct.* 647 F.2d 940, 941 (9th Cir. 1981); but see
 18 *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982) (in dicta, discussing *Valenti*
 19 with approval).

20 Since *Valenti* was decided in 1969, and especially in the past twenty years, the
 21 Supreme Court has placed stringent new limits on the authority of a state legislature
 22 under the Elections Clause—especially when the state legislature seeks to determine who
 23 may represent the people in Congress. *E.g.*, *U.S. Term Limits* and *Cook v. Gralike*,

1 discussed *supra*. As set forth above in section II, the Court has also held that under the
2 First Amendment and Equal Protection Clause a state legislature may issue only
3 procedural regulations—not determine, as in this case, who will serve. *Burdick*, 504 U.S.
4 at 434; *see also U.S. Term Limits*, 514 U.S. at 834-35 (collecting cases). By mandating
5 that defendant Kyl or his successor serve two years in office, A.R.S. § 16-222 is far from
6 a "procedural" regulation upheld by the Court in recent years. Indeed, just two years ago,
7 in *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2652, the Court sharply limited the
8 scope of state authority under the Elections Clause and affirmed the right of the people to
9 make their own decisions as to the way they are represented in the Congress. None of
10 these decisions can be reconciled with an unexplained summary order of a half-century
11 ago.
12

13 Finally, notwithstanding *Valenti*, this Circuit indicated that the precise legal
14 challenges made in this case deserve a hearing. In *Hamamoto v. Ige*, 881 F.3d at 723,
15 decided this very year, which raised the same claims as in this case, the Ninth Circuit
16 stated: "[A] suit challenging the appointment of a United States Senator raises questions
17 of national importance." Meanwhile the *Valenti* court did not even consider, let alone
18 decide, the "precise issues presented" by plaintiffs. Unlike in *Valenti*, the plaintiffs here
19 submit that the Seventeenth Amendment requires the Governor to issue a writ; that the
20 Elections Clause limits the states to politically neutral, procedural regulations on federal
21 elections, but A.R.S. § 16-222 violates those limits; and that the right to vote for a United
22 States senator, and to be represented by an *elected* United States senator, is a privilege or
23 immunity of national citizenship within the meaning of the Fourteenth Amendment.

1 Accordingly, *Valenti* did not address—and does not control—the issues now before this
2 Court.

3 **CONCLUSION**

4 For all the reasons set forth above, plaintiffs are entitled to an order directing the
5 Governor to issue a writ of election in no later than six months.

6
7 Respectfully Submitted,

8 Dated: November 28, 2018

9 By: /s/ Michael Kielsky
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